

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable A. Bruce Campbell**

In re:)	
)	
JAMES DEAN SANCHEZ)	Case No. 09-36815 ABC
SSN: XXX-XX-4358)	Chapter 13
)	
Debtor.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING CONFIRMATION

Before the Court is the Debtor's Amended Chapter 13 Plan, dated February 11, 2010, and the Objection thereto filed by the Chapter 13 Trustee. Mr. Sanchez, an above-median income debtor, has proposed a plan which, the Trustee asserts, fails to pay into his plan all Debtor's Projected Disposable Income as mandated by 11 U.S.C. § 1325(b).

The Chapter 13 Trustee has interposed two objections. Specifically, when Debtor performed the calculation for disposable income on his Form 22C, at Subpart C: Deductions for Debt Payment, he took a deduction for a second mortgage which he asserts is completely unsecured and which he proposes to "strip off" for purposes of treatment in the plan.¹ The Trustee's second objection goes to a "Deduction for Special Circumstances" which subtracts income Debtor received from a second job which he quit immediately before filing this case, but which he had held during the six-month prepetition period used for calculating Debtor's "Current Monthly Income" as defined in section 101 of the Code.

A. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and (b) and 28 U.S.C. §§ 157(a) and (b)(1). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), as it concerns confirmation of a plan. The Debtor's application to confirm his plan and the Chapter 13 Trustee's objections thereto were tried to the Court on April 8, 2010.

B. PROPOSED PLAN AND DISPOSABLE INCOME

Debtor's proposed plan dated February 11, 2010, provides for distribution of \$24,441 to Class 4 general unsecured creditors. Included in Class 4 is \$45,313 held by the beneficiary of the second deed of trust against the Debtor's residence. Because the collateral for this debt has been valued at an amount less than the first deed of trust encumbering it, the \$45,313 junior trust deed will be "stripped off" pursuant to Bankruptcy Code section 506(a).

The Debtor, on Form B22C, computes Monthly Disposable Income (Line 59) in the amount of \$479.60. Part of this calculation of Monthly Disposable Income includes deductions (at Lines 47(b) and 48(b)) of \$342 and \$25.32, respectively, for monthly debt service and catch up of pre-petition arrearages on the stripped off second deed of trust loan. As a consequence of these deductions, \$22,039.20 (*i.e.* \$342 +

¹ At the time of filing his Chapter 13 petition, Debtor filed a Motion to Determine Secured Status of his second mortgage loan under Bankruptcy Code section 506. That motion has not been opposed by the "under-secured" lender. However, no order has entered on it because any ruling must be made under section 506(a) in conjunction with the hearing on confirmation of the plan. See 11 U.S.C. §506(a)(1).

$\$25.32 \times 60 = \$22,039.20$) is available for the Debtor's own use during the five years of his Chapter 13 plan, in addition to his living expenses otherwise included in Form B22C. If the debt service and arrearage for the stripped off junior mortgage are not included in the Debtor's Projected Disposable Income calculation, this amount of \$22,039.20, less the Chapter 13 Trustee's commission, would be added to and included in distributions in Class 4 of the plan for general unsecured creditors.

The Debtor, since filing his Chapter 13 case has been employed full time. As a salaried sales manager at Bed Bath and Beyond, he works 47.5 to 50 hours per week. For approximately three and one-half years, ending shortly before filing this Chapter 13 case in December 2009, Debtor held a second job. There he worked approximately 18 to 20 hours per week. This second job entailed a commute of one and one-half to two hours. The Debtor testified that he quit this second job for two reasons. It did not provide a means of avoiding bankruptcy, and it was taking a toll on his health.

In calculating Projected Disposable Income, the Debtor started with his average monthly income for the six complete calendar months preceding the filing of this case on December 17, 2009. 11 U.S.C. §§ 1325(b)(2) and 101(10A). Because this calculation included not only income from his current job, but income from the second job he quit before filing Chapter 13, it does not accurately reflect Debtor's actual, present monthly income status from his full time job. It is too high. As a result, Debtor made an adjustment in computing his Monthly Disposable Income for "special circumstances," by deducting \$571.97 net monthly income from the second job he no longer holds, but which he held in the six months prior to filing bankruptcy -- the six months used in calculating "Current Monthly Income" as part of computing monthly Projected Disposable Income. This "special circumstances" adjustment adversely reduces plan distributions over the duration of the plan by \$34,318.20 (*i.e.* $\$571.97 \times 60 = \$34,318.20$). Debtor has no means of funding this amount during his plan without seeking employment in addition to his current 47.5 to 50 hour a week job.

C. ANALYSIS

1. Amount Contractually Due Secured Creditors.

The Debtor emphasizes that the fully unsecured lien that is "stripped off" in a Chapter 13 plan, while treated as unsecured in the plan, is merely held in abeyance and is not voided or extinguished until and unless the Chapter 13 debtor successfully completes his plan payments and, only then, obtains a discharge. 11 U.S.C. §§ 1328, 348, and 349. If the plan fails and the case is dismissed or converted to Chapter 7, the lien, previously "stripped" for Chapter 13 plan treatment, never having been extinguished, comes back to life as if there had never been a Chapter 13 case. Accordingly, the Debtor seeks, in computing Projected Disposable Income, to include as a deduction the monthly payments for the stripped "secured" debt among amounts scheduled as contractually due to secured creditors. Debtor bolsters this argument with the contention that Projected Disposable Income is a calculation to be made as of the filing of the Chapter 13 petition, a date that necessarily predates any section 506(a) "strip off." This, the argument goes, is a time when the "secured," soon to be "stripped," debt was, in fact, "contractually due."

Congress, by its 2005 BAPCPA amendments to the Bankruptcy Code, imposed "means testing" on above-median income Chapter 13 consumer debtors in order to insure that debtors whose income materially exceeds reasonable living expenses would be required to pay the excess to creditors in exchange for bankruptcy relief. Mr. Sanchez's effort to exclude from Projected Disposable Income monthly mortgage payments that, rather than being paid to a lender under a Chapter 13 plan, would fall to the Debtor for the duration of his plan, over and above what he needs to get along under the means test formula, is entirely inconsistent with Congress's very purpose in adding means testing to Chapter 13 for above-median income

debtors.² The debt service on the Debtor's stripped off second mortgage may not be deducted from amounts to be paid by the Debtor to his creditors under his proposed Chapter 13 plan.

2. "Special Circumstances" Income Deduction.

The calculation of Projected Disposable Income for purposes of means testing contemplates the possibility of "special circumstances"³ which allow for "additional expense or adjustment of income" in arriving at the amount that must be paid to fund a Chapter 13 plan. This Court declines at this juncture to address whether Debtor's voluntarily changed employment circumstances immediately before filing this case constitute the sort of "special circumstances" that can justify use in computing Projected Disposable Income of an amount less than "current monthly income," as prescribed by 11 U.S.C. § 1325(b)(2) and defined in 11 U.S.C. § 101(10A).⁴ The Court chooses to defer answering that question until faced with a plan that is otherwise confirmable. By such time this Court may have further guidance from the United States Supreme Court which is presently reviewing the Tenth Circuit Court of Appeals' ruling on a closely related question concerning changed circumstances, current monthly income, and Projected Disposable Income.⁵

D. CONCLUSION

Debtor has failed to contribute all his Projected Disposable Income to the Amended Plan. Accordingly, it is

ORDERED that the Chapter 13 Trustee's objection is sustained and confirmation of Debtor's Amended Plan is DENIED; and it is

FURTHER ORDERED that Debtor is afforded a period of 14 days from the entry of this Order to file an amended plan, if he so elects, failing which this case may be dismissed.

DATED: May 26, 2010

BY THE COURT:



A. Bruce Campbell
United States Bankruptcy Judge

²This Court reached the same conclusion for the same reasons in ruling that where a debtor had surrendered collateral to a secured creditor after filing Chapter 13, he could not deduct from Projected Disposable Income his monthly payment on the collateral that, on the date of filing his Chapter 13 case had been "an amount scheduled as contractually due to secured creditors." See *In re Barajas* 08-13684 ABC (August 11, 2008). The United States Supreme Court recently accepted for review a Chapter 13 case presenting the analogous issue of whether an above-median consumer Chapter 13 debtor, in computing Projected Disposable Income, can make use of a standard vehicle ownership deduction, which includes a debt service component, for vehicles that are, in fact, unencumbered. *Ransome v. MBNA, AmericaBank NA*, No. 09-907 (cert. granted April 19, 2010).

³"Special Circumstances" are defined in the Bankruptcy Code only by example,... "such as a serious medical condition or a call or order to active duty in the Armed Forces...for which there is no reasonable alternative [to adjusting the means test calculus]." 11 U.S.C. §§ 1325(b) and 707(b)(2)(B)(i).

⁴This Court has previously ruled that in changed circumstances in which a debtor's actual monthly income at the time of Chapter 13 plan confirmation is substantially in excess of "current monthly income" as defined in 11 U.S.C. § 101(10A), the excess must be treated as disposable income and committed to payment of creditors under the Chapter 13 plan. See *In re Odom*, 406 B.R. 911 (Bankr. D. Colo. 2009).

⁵*Hamilton v. Lanning*, No. 08-998 (argued March 22, 2010).